THE MANITOBA HUMAN RIGHTS COMMISSION

RESPONSE TO THE ABORIGINAL JUSTICE INQUIRY

March 27th 1992

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PREAMBLE

In April of 1988, Associate Chief Justice A. C. Hamilton and Associate Chief Judge C. M. Sinclair were asked to conduct an inquiry into all aspects of the cases involving the deaths of Helen Betty Osborne and J. J. Harper. In addition, the Commissioners were mandated to make a general examination of the relationship between the justice system and the Aboriginal people. This mandate included a study of policing, access to and adequacy of legal counsel, court dispositions, post-sentencing treatment, awareness and knowledge of the justice system, communication between justice system personnel and Aboriginal people and employment of Aboriginal people in the justice system.

The Commission commends the Minister for his action in establishing the Aboriginal Justice Inquiry and in his selection of the two persons responsible for its undertaking. The Commission notes that the suggestion for an inquiry originated with the previous Government in dialogue with Aboriginal leaders and that the need was recognized and implemented by the current legislative assembly. It is the Commission's expectation that the Government will act upon the recommendations it sought by this inquiry in an expeditious manner. Once injustice and discrimination has been identified, to permit it to continue without promptly commencing a process of mitigation constitutes a continuing discrimination.

In the preamble to the **Manitoba Human Rights Code**, it states that Manitobans recognize the individual worth and dignity of every member of the human family. Implicit in this principle is the right of all individuals to be treated in all matters solely on the basis of their personal merits, and to be accorded equality of opportunity with all other individuals. To protect this right, it is necessary to restrict unreasonable discrimination against individuals, including discrimination based on stereotypes or generalizations about the group to which they belong. Past discrimination against people, particularly Aboriginal people, has resulted in serious disadvantage, and the Commission recognizes that it is important to provide for affirmative action programs and other special programs designed to overcome this historic disadvantage. The Commission therefore supports measures described in the Report that recommend affirmative actions and special programs.

REACTION TO THE REPORT GENERALLY

The Commission recognizes that the injustice done to the Aboriginal peoples of Canada goes well beyond the issue of how an individual Aboriginal person is treated by a provincial justice system. Social injustices of the past, unresolved treaty rights and land claims, and residential schools, among others, have taken their toll.

Land claims and treaty rights are still in the process of being resolved. The Commission is heartened to hear of recent settlements and encourages those responsible for the negotiation of outstanding claims to come to a speedy resolution of these issues. The residential schools - which intentionally or not, robbed children of their language, culture, spirituality, history and families - was in retrospect, nothing short of a human tragedy. The Aboriginal peoples today, are still paying the price of four generations of this cultural isolation. Dysfunctional families, and suicide, (especially by young people) is not a cultural trait of any people; it is a response to historic injustice and ongoing poverty. The Commission commends the Aboriginal peoples for the movement to reclaim culture, tradition and spirituality that is underway as a path toward a great healing.

In summary, the Commission concurs with the overall approach in the report. To make recommendations confined exclusively to the process of justice without considering the whole social and historic perspective would not be meaningful.

ABORIGINAL WOMEN

The Commission was particularly appalled at the Inquiry's revelation of the plight of Aboriginal women, as victims of abuse and crime. Abuses, discrimination and differential treatment, all have, as a base, the abuse of power that one has over another. Again the Commission notes the relationship of the residential school system to the dysfunctional family.

Aboriginal women as well, have an overly disproportional representation amongst women prisoners generally. The effect upon children of the imprisonment of either parent cannot be underestimated. However, although we are moving toward equal responsibility of both parents for childcare, it is still a fact of life that, in most families, the mother-child emotional relationship is the one of major influence. The Portage Correctional Institution is the only prison for women in the Province. The majority of the children of these prisoners tend to be geographically located at unreasonable distances from the prison for visits. The impact of this separation on a family should not be underestimated.

The Commission strongly concurs with the recommendations of the Inquiry and encourages the Ministry of Justice to move as expediently as possible to improve the equality of Aboriginal women, especially those imprisoned.

JUSTICE SYSTEM

As the Inquiry reminds us, the Aboriginal people had self-government before the arrival of the European settler. As the size and power of the European community grew, it imposed upon the Aboriginal nations a European concept of justice, law and government which was based upon a different historic experience and reflected a different value system and process.

Aboriginal people have a right to a system of justice based upon the traditions and values of its own culture. The imposition of an external system of justice without consideration of these values, denigrates the people it seeks to serve. The Manitoba Human Rights Commission endorses the concept of a culturally sensitive justice system for Aboriginal peoples as a first step toward self - government.

As part of the justice system, the Manitoba Human Rights Commission seeks to uphold justice through the Manitoba Human Rights Code. As previously stated, the Commission has for some time been concerned about the underutilization of its services by Aboriginal people.

The Commission has always successfully sought to have Aboriginal representation both in its staff and Commissioners. The panel of adjudicators appointed by the Government are practicing lawyers, none of whom are Aboriginal or Metis. The Commission would encourage the appointment, as adjudicators, of persons of Aboriginal

or Metis descent, with or without formal legal degrees. Adjudicators in other jurisdictions, such as the B.C. Council for Human Rights, and Judges in the Tribal courts in the U.S.A. are drawn from the community and the lack of formal legal education does not appear to present a barrier to effective adjudication.

The Commission realizes that it too, was established under a system of values and processes that do not meet Aboriginal peoples' expectation or culture. The traditional model on which the Commission is based is driven by the filing of a complaint. After a complaint is served, the Anglo-American based system of evidence and proof is used to determine the merit of the case. Although there is no punitive aspect to **The Code** and resolutions to complaints are frequently voluntary agreements between the parties, the practice has been to establish a contravention of **The Code** prior to conciliation.

The Commission's understanding of the Aboriginal model is that, where hurt has been demonstrated, both parties, with the aid of the community, would move toward a resolution without the need to prove culpability. The Commission is identifying ways in which it can modify its process to incorporate this concept thereby making it more accessible to the Aboriginal communities within its jurisdiction.

The Commission is eager to examine other models to resolve human rights contraventions, models which avoid the determination of blame and which rely on mediation to conciliate complaints of discrimination.

The Commission is prepared to cooperate fully with Aboriginal peoples in determining appropriate methods as a new justice system evolves.

ABORIGINAL REPRESENTATION IN POLICE FORCES

The Manitoba Human Rights Commission fully endorses the Inquiry's recommendation for employment equity by Manitoba's major municipal police forces. As will be described later in this response, the Commission has, within its mandate, the legislation and framework to supervise such programs. The Commission's experience with the municipal police forces on a complaint by complaint basis confirms the Inquiry's findings that an employment equity plan for Aboriginal people is needed. The composition of any police force should be a reflection of the community it serves. Aboriginal peoples are the fastest growing segment of Manitoba's diverse community and, as such, we should expect to see a significant representation among the officers of the major municipal police forces.

Affirmative action programs have been successfully introduced to increase Aboriginal representation in areas such as nursing and social work. The Commission sees no reason why such a program should not be effectively introduced with the municipal police forces.

Although confident of the abilities of our counterparts in the Canadian Human

Rights Commission and the R.C.M.P., the Commission wishes to support the recommendation of increasing the Aboriginal representation amongst the R.C.M.P. The Commission feels it is particularly important that there be an Aboriginal police presence on the reserves, again the principle of self-government applies. Enforcement of law should be, and be seen to be, self-imposed rather than externally imposed. Self control and self regulation leads to self respect not only in individuals but within communities.

SENTENCING

The very fact that Aboriginal people, particularly women, make up a disproportional part of the inmates of prison would, on its face, suggest a form of systemic discrimination.

The principle of equality requires that great attention be placed upon the effect of actions. Human rights decisions, reflected in many recent Supreme Court judgements, have established that treating people identically does not guarantee equality. The option of paying a fine as an alternative to prison, although offered to all, cannot be said to be an equal opportunity when one of the groups involved is severely economically disadvantaged. Aboriginal people, as a group, are over represented in the lower income brackets. They do not have the same opportunity to avoid imprisonment, by paying a fine, as would a person from a higher income bracket. Indeed, if the primary intent of imprisonment is punishment and rehabilitation, then it could be argued that fines themselves do not have these

effects. Regardless of options, where the fine is the same amount for each person, the effect is different on each, depending on their financial circumstances. It is indisputable that the effect of imprisonment is different from the effect of paying a fine. Imprisonment carries with it unavoidable social consequences. Most people in prison lose their jobs, reducing financial support for their families. Families suffer physical separation and emotional strain. The imprisonment of one family member can seriously affect the family, socially, economically and emotionally. Statistics show it is more likely to be the Aboriginal person that is imprisoned.

The stigma of a prison sentence in our society seriously affects the ability to secure employment. Being fined for an offence does not have the adverse impact that serving time in prison does, even though the offence against society is the same. This puts the Aboriginal person, who is more likely to be imprisoned, at a serious disadvantage in securing employment. The Inquiry suggests that the option of community work in lieu of a fine is, in practical terms, frequently not available to the Aboriginal person as much as it is to the general population. The Commission notes that incarceration is not a traditional method of reforming wrongdoers in the Aboriginal community. It concurs with the Inquiry's finding that more use be made of alternate methods of correction as recommended in the report.

The removal of people from society, by voluntary confinement in the home, or the alternative methods recommended by the Inquiry are endorsed by the Commission. These recommendations of the Inquiry follow the principles inherent in human rights philosophy, that of restitution rather than blame and punishment. These methods are

also more compatible with the traditional corrective patterns of Aboriginal communities. Notwithstanding this, the Commission does recognize that, for some crimes and for some individuals, there is no alternative to a prison sentence.

EMPLOYMENT EQUITY AND THE ROLE OF THE COMMISSION

The Commission notes that, when the scope of the Inquiry widened, the mandate and practices of The Human Rights Commission were not included. The Commission itself realized that, however indirectly it is associated with the correctional system, it needed to examine more closely its growing concern regarding its relationship to, and utilization of its services by Aboriginal persons.

The Aboriginal Justice Inquiry was directed to examine the justice systems previously mentioned. The results of the inquiry suggest a systemic discrimination against Manitoba's First Nations because of their ancestry. Systemic discrimination pervades the fabric of our society for many groups and, as such, has been a growing concern for the Commission and in large part prompted the Commission's recent move to allocate some of its limited resources to developing systemic remedies as a means of making greater social change.

An "issues approach" to the resolution of discriminatory practices was publicized by the Commission on Human Rights Day, December 10th, 1991. Focusing on issues enables the Commission to use a more systemic approach to resolving systemic ills in

our society. The Commission is currently developing plans to research the paramount barriers to equality affecting Aboriginal peoples, including among others, the underutilization of the services of this Commission by Aboriginal people. The Aboriginal Justice Inquiry will be used as one of the foundations of a continuing dialogue with Aboriginal groups.

In Chapter 16 of the report, the Aboriginal Justice Commissioners propose there be a significant strengthening of employment equity programs, particularly in the case of the Winnipeg and Brandon Police Forces, and these programs be tabled with the Ministry of Justice. In Chapter 17, in its strategy for action, the report recommends the enacting of an Employment Equity Act. Such legislation would provide for an Employment Equity Commission with wide powers to support, monitor and require the development and implementation of employment equity programs in all government services and in those areas over which the Province has jurisdiction.

This mandate currently exists both in a voluntary and mandatory form within **The Manitoba Human Rights Code**.

Section 11 of **The Code** allows for voluntary programs of employment equity or special programs to ameliorate the condition of disadvantaged individuals or groups.

Section 43(2) permits an adjudicator to order the adoption and implementation of an affirmative action program or other special program, such as employment equity if

the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening **The Code.**

Further, Section 47(1) gives the adjudicator powers to supervise or order a variation of the program, until, in the opinion of the adjudicator, there has been full compliance with the program and Section 47(2) allows the Commission to supervise the program or provide assistance in the adoption or implementation of such programs.

Section 56 contains as part of any contract entered into by the government, Crown or local authority, a provision for affirmative action or special program related to the implementation of the contract. The only reason the Commission has not vigorously encouraged the application of this provision of **The Code** is that it lacks the resources to monitor compliance due to the backlog of individual complaints awaiting its attention.

It is evident, therefore, that the Commission has the authority to implement programs such as the report recommended by the establishment of an Employment Equity Act.

The Manitoba Human Rights Commission, has the legislated authority and the commitment to implement employment equity but it lacks the resources to pursue a more aggressive promotion of this undeniably important program. Whether the government establishes a separate Commission for Employment Equity for Aboriginal peoples, or

uses the structure already available to it within **The Manitoba Human Rights Code**, it is going to require the commitment of additional resources for any such program to become reality. Willing as it is to undertake this further responsibility for employment equity, the Commission cannot commit to the further expenditure of its limited resources at the expense of its current obligations, especially to individual complainants, which **The Code** also mandates the Commission to serve. Given more resources, the Commission is ready to assume its full responsibilities in this area.

BARRIERS TO EQUALITY

The Commission agrees with the Inquiry's findings that employment equity is affected by other significant factors. Employers alone cannot, by the introduction of employment equity programs, resolve all of the fundamental barriers to equality in the workplace. Without the opportunity for schooling, how will the Aboriginal person be able to enter secondary education? Without the accreditation provided by secondary education, how will the Aboriginal person compete with others for a job in a tight employment market? Yet the Aboriginal peoples' past experience of discrimination by employers makes today's young Aboriginal person less inclined to acquire an education. Compounding the problem, given very high levels of unemployment, employers can, as the inquiry points out, demand increasingly higher qualifications for jobs.

When qualifications for jobs are not bona fide and are not relevant to the ability to perform the job, even though they may be uniformly applied to all job

candidates, adverse impact discrimination will occur. For example, police forces in the past would only accept candidates whose height was five feet ten inches or taller and whose weight was 165 pounds or more. This standard was applied to all candidates. This is definitely treating people the same, however it tends to have an adverse impact on most women and many Asian men. Nor is being five feet ten inches or 165 pounds any indicator of the ability to perform as a police officer. Similarly, inflated job qualifications, though they may indeed be applied to all prospective employees, may have an adverse impact on groups such as Aboriginal people. Thus the vicious circle is completed.

Implicit in the success of any employment equity plan is the achievement of an acceptable level of hospitality in the workplace. Although an inhospitable environment is not a barrier to gaining employment, it is often a significant factor when members of a minority group quit the workplace. It negates the best efforts of recruiters if the workplace environment is hostile and unwelcoming to newcomers. Frequently, managers and other employees act out the stereotypical assumptions that are held about others, particularly about Aboriginal people. Harassment in employment because of a person's race or ancestry is a common complaint received by the Commission and is frequently the reason why people from minority groups feel compelled to leave the workplace.

GATHERING OF INFORMATION

The Chairperson of the Commission, in his presentation to the Aboriginal Justice Inquiry, corrected the misunderstanding of the City of Winnipeg Police Department that **The Code** prohibited the collection of data based on ancestry or ethnic background. Misinterpreting **The Code** is frequently an excuse for inaction. The Commission would like to state again that there is nothing in **The Manitoba Human Rights Code** which prohibits the collection of data for the purposes of achieving greater equality. Indeed the careful collection of relevant data is an essential tool in any equity program.

CONCLUSION

The Commission notes that the report recommends change to almost all components of the justice system, including policing, corrections, probation, the child welfare and young offender systems. The report suggests that women within the Aboriginal community need extensive changes made to the system in order for them to achieve equality before the Courts.

With respect to matters within Provincial jurisdiction, the Commission concurs with the overall approach of the Aboriginal Justice Inquiry and urges the Government of Manitoba, and in particular the Department of Justice, to put those

recommendations in place with all due expediency. In addition, the Commission also urges the Province of Manitoba to take a pro active position with respect to those issues falling outside of Provincial jurisdiction. Given the Commission's mandate to protect the rights of the individual, it is especially concerned that, whatever form Aboriginal self government may take, it will respect the equality, dignity, rights and worth of all its members - men, women and children.

The Commission feels most strongly that it is only by cooperation of all the parties involved, the justice system, police departments, Aboriginal Leaders, Elders, Aboriginal Women's groups, Metis organizations and others, that any effective, lasting and acceptable change can be made. The establishment of this Inquiry - and the competence with which it has been executed - was a major initiative. This has created an unique opportunity for change which could be a milestone in the relationship between government and Aboriginal people.

Greatest care must be taken to ensure that this significant opportunity for change is realized to the maximum benefit possible. The Commission believes that the manner and process used to determine the changes to be made is of paramount importance. The Commission strongly suggests that changes should be determined using a consultative and collaborative approach. It is only with a spirit of willingness, openness to change and determination to meet the needs of all of the parties, that significant lasting change can be made.

Manitoba is at a crossroads of opportunity. A creative and tangible response to the issues raised by this report could be a model for all governments and indigenous peoples everywhere.